No. 20-608C
(Judge Kathryn C. Davis)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

RED CLOUD et al.,

Plaintiffs,
v.

THE UNITED STATES,

Defendant.

DEFENDANT'S REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR LACK OF JURISDICTION

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Defendant.	)	

DEFENDANT'S REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR LACK OF JURISDICTION

Defendant, the United States, respectfully submits this reply to plaintiffs' opposition to defendant's motion to dismiss plaintiffs' complaint. *See* Pls. Opp'n, ECF No. 11, Dec. 14, 2020; Def. Mot., ECF No. 7, Sept. 14, 2020; Compl., ECF No. 1, May 15, 2020. Plaintiffs' complaint should be dismissed because this Court lacks jurisdiction to entertain plaintiffs' claims.

ARGUMENT

As we explained in our motion, plaintiffs' claims pursuant to the "bad men" clause of the Treaty with the Sioux of April 29, 1868, 15 Stat. 635 (Ft. Laramie Treaty), are barred by the applicable statute of limitations, 28 U.S.C. § 2501. Thus, this Court lacks jurisdiction over plaintiffs' complaint. *See* Def. Mot. 3-10. In opposition, plaintiffs argue that, under the "accrual suspension rule," the treaty claims based on alleged[1] sexual abuse by Dr. Stanley Weber were "inherently unknowable" and, therefore, the alleged abuse did not cause their claims to immediately accrue. *See* Pls. Opp'n 34-40. Additionally, plaintiffs contend that "unknown agents and employees of the Indian Health Services discovered that Dr. Weber was a pedophile

[1] We refer to these as "alleged" not to impugn their accuracy, but because the focus of this motion is the complaint on its face; thus we do not and need not address their accuracy.

prior to his 1995 transfer to Pine Ridge and continued to receive such knowledge" and suggest that this alleged knowledge was concealed by the Government and inherently unknowable. *See* Pls. Opp'n 29.

As demonstrated below, the claims alleged in the complaint were not inherently unknowable in the legal sense. Further, plaintiffs' contention about the alleged knowledge of "unknown agents and employees" is inapposite to the complaint—which identifies only Dr. Weber as the "bad man"—and the allegations about "unknown agents and employees," made for the first time in an opposition brief, are insufficient to raise a claim within this Court's jurisdiction.

I. The Claims Are Barred By The Six-Year Statute of Limitations

As demonstrated below and in our motion, plaintiffs' claims are barred by the jurisdictional statute of limitations and should be dismissed.

Suits against the United States in the Court of Federal Claims are subject to a six-year statute of limitations. 28 U.S.C. § 2501 ("Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."). It is well-established that this limitations period "is jurisdictional and may not be waived or tolled." *FloorPro, Inc. v. United States*, 680 F.3d 1377, 1380-81 (Fed. Cir. 2012) (citing, *inter alia*, *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 136-39 (2008)).

The statute of limitations begins to run, and a Tucker Act claim accrues, "as soon as all events have occurred that are necessary to enable the plaintiff to bring suit, *i.e.*, when 'all events have occurred to fix the Government's alleged liability, entitling the claimant to demand payment and sue'" for money. *Martinez v. United States*, 333 F.3d 1295, 1303 (Fed. Cir. 2003)

(en banc) (quoting *Nager Elec. Co. v. United States*, 368 F.2d 847, 851 (Ct. Cl. 1966)) (citations omitted); *accord Catawba Indian Tribe of S.C. v. United States*, 982 F.2d 1564, 1570 (Fed. Cir. 1993); *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988). The question of "whether the pertinent events have occurred is determined under an objective standard; a plaintiff does not have to possess actual knowledge of all the relevant facts in order for the cause of action to accrue." *FloorPro*, 680 F.3d at 1381 (citation and internal quotation marks omitted).

A. The Claims Accrued When The Alleged Abuse Occurred

As we demonstrated in our motion, plaintiffs' claims pursuant to the Ft. Laramie Treaty are untimely because the acts alleged in the complaint that enabled plaintiffs to bring suit occurred more than six years ago, *Martinez*, 333 F.3d at 1303, and the latest any of the five plaintiffs could have filed suit was sometime in 2016, three years after the youngest plaintiff turned 18 years old. *See* Def. Mot. 3-10. That year is of consequence because plaintiffs maintain abuse occurred when they were under the legal disability of infancy, and section 2501 extends the statute of limitations until "three years after the disability ceases."

In opposition to our motion, plaintiffs do not dispute that Dr. Weber's crimes alleged in the complaint occurred more than six years ago; that sometime in 2016 the youngest plaintiff turned 18 years old; and that that their complaint was filed more than three years after that point. Plaintiffs also make no meaningful attempt to dispute that, ordinarily, a "bad men" claim pursuant to the Ft. Laramie Treaty would accrue at the time of the alleged crime. Instead, as noted, plaintiffs rely on the "accrual suspension rule," arguing that the claims based on the alleged sexual abuse by Weber were inherently unknowable. Pls. Opp'n 36-40. That rule, however, does not affect the accrual of the claims here.

B. The Accrual Suspension Rule Does Not Exempt Plaintiffs' Claims

Under the accrual suspension rule, the accrual of a claim against the United States will in some situations be suspended when an accrual date has been ascertained, but the plaintiff does not know of the claim. *Ingrum v. United States*, 560 F.3d 1311, 1314 (Fed. Cir. 2009) (citing *Japanese War Notes Claimants Ass'n v. United States*, 373 F.2d 356, 358-59 (Ct. Cl. 1967)). However, the "proper focus for statute of limitations purposes is upon the time of the [defendant's] *acts*, not upon the time at which the *consequences* of the acts became most painful." *Goodrich v. United States*, 434 F.3d 1329, 1333-34 (Fed. Cir. 2006) (quoting *Fallini v. United States*, 56 F.3d 1378, 1383 (Fed. Cir. 1995)) (alteration and emphases in original) (internal quotation marks omitted).

"The accrual suspension rule is 'strictly and narrowly applied,' and the accrual date of a cause of action will be suspended in only two circumstances: '[the plaintiff] must either show that defendant has concealed its acts with the result that plaintiff was unaware of their existence or it must show that its injury was 'inherently unknowable'' at the time the cause of action accrued." *Ingrum*, 560 F.3d at 1315 (quoting *Martinez*, 333 F.3d at 1319) (alteration in original). "However, a plaintiff's ignorance of a claim that he should have been aware of is not enough to suspend the accrual of a claim." *Id.* at 1314-15 (citing *Japanese War Notes Claimants Ass'n*, 373 F.2d at 359, and *Braude v. United States*, 585 F.2d 1049 (Ct. Cl. 1978)). Further, "it is not necessary that the plaintiff obtain a complete understanding of all the facts before the tolling [of accrual] ceases and the statute begins to run." *Hopland Band of Pomo Indians*, 855 F.2d at 1577 (citing *Japanese War Notes Claimants Ass'n*, 373 F.2d at 359).

This Court has defined inherent unknowability as "tantamount to sheer impossibility of notice." *Rosales v. United States*, 89 Fed. Cl. 565, 578 (2009) (citing, *inter alia*, *Japanese War*

Notes Claimants Ass'n, 373 F.2d at 359); *see also Ladd v. United States*, 713 F.3d 648, 653 (Fed. Cir. 2013) ("The 'inherently unknowable' standard is shorthand for the proposition that a claim does not accrue until the claimant 'knew or should have known' that the claim existed.") (citations omitted). Alternately, but to the same effect, this Court has described the standard as requiring plaintiffs to show there was "nothing to alert one to the wrong at the time it occur[red]," *Petro-Hunt, L.L.C. v. United States*, 90 Fed. Cl. 51, 61-62 (2009) (citations omitted); that the factual basis for the claim is "incapable of detection by the wronged party through the exercise of reasonable diligence," *Texas Nat'l Bank v. United States*, 86 Fed. Cl. 403, 414 (2009) (quoting *Ramirez-Carlo v. United States*, 496 F.3d 41, 47 (1st Cir. 2007)) (internal quotation marks omitted); and that "the possibility of notice is foreclosed by, for example, the complete absence of relevant evidence," *Ram Energy, Inc. v. United States*, 94 Fed. Cl. 406, 411 (2010) (citation omitted).

Where, as here, the plaintiffs allege that the criminal wrongs occurred to them in person, it cannot be said that there was "nothing to alert [them] to the wrong at the time it occur[red]," *Petro-Hunt, L.L.C.*, 90 Fed. Cl. at 61-62, nor to avail themselves of any alternative formulation of the "inherent unknowability" test.

Plaintiffs' brief responds that "childhood sexual abuse is a phenomena that involves delayed discovery by its very nature" and that plaintiffs did not realize until later that they had been emotionally or psychologically harmed by the alleged abuse. *See* Pls. Opp'n 36-38. At the outset, we note that plaintiffs' brief is not evidence. *See Icon Health & Fitness, Inc. v. Strava, Inc.*, 849 F.3d 1034, 1043 (Fed. Cir. 2017) ("Attorney argument is not evidence.") (citations omitted). Moreover, even if it were, plaintiffs' argument runs afoul of the rule that the "proper focus for statute of limitations purposes is upon the time of the [defendant's] *acts*, not upon the

time at which the *consequences* of the acts became most painful." *Goodrich*, 434 F.3d at 1333-34 (quoting *Fallini*, 56 F.3d at 1383) (alteration and emphases in original) (internal quotation marks omitted).

Were it true that plaintiffs lacked knowledge of the acts themselves, that would be another matter. But this is not such a case. Nor do plaintiffs contend it is. Instead, plaintiffs' summary declarations variously contend, among other things, that they did not understand the wrongfulness of the alleged acts or the relationship between the alleged acts and any injury. *See generally* Pls. Opp'n App'x 317-332. They do not, however, contend plaintiffs lacked knowledge of the alleged acts—the alleged crimes—that occurred to fix the Government's alleged liability, entitling plaintiffs to demand payment and sue. *Martinez*, 333 F.3d at 1303. Thus, plaintiffs have not shown that their treaty claims based on Dr. Weber's alleged abuse were "inherently unknowable."[2]

In opposition, plaintiffs cast the alleged "inherent unknowability" of their claims as materially identical to *Urie v. Thompson*, 337 U.S. 163 (1949), which linked the required knowledge of injury in that case to the manifestation of injury in that case. *See* Pls. Opp'n 34. But plaintiffs' brief fails to make the case that the evidence they rely on equates to the situation presented in *Urie*, which turned on the peculiar nature of the statute and the cognizable claim at issue in that case.

[2] To the extent plaintiffs' "inherent unknowability" argument could be read to suggest that plaintiffs did not file suit earlier because they were not aware of their legal rights, plaintiffs' personal ignorance of their legal rights, including that they might sue the United States, does not suspend the accrual of a claim. *See Shoshone Indian Tribe of Wind River Reservation, Wyo. v. United States*, 672 F.3d 1021, 1031 (Fed. Cir. 2012) ("It is settled law, however, that § 2501 is not tolled by the Indians' ignorance of their *legal rights*.") (emphasis in original) (citations and internal quotation marks omitted).

Urie concerns a Federal Employers' Liability Act (FELA) negligence suit filed in 1941, seeking recovery for silicosis, allegedly caused by the employee's exposure to silica dust since 1910. At issue there was the accrual of a negligence claim for an "injury" under FELA's statute of limitations, not a treaty claim based on an alleged crime and the Tucker Act's jurisdictional statute of limitations, 28 U.S.C. § 2501. *See Jones v. United States*, 846 F.3d 1343, 1355 (2017) (interpreting a similar treaty and stating that "[w]e agree with the Government that only acts that could be prosecutable as criminal wrongdoing are cognizable under the bad men provision"); *Tsosie v. United* States, 11 Cl. Ct. 62, 71 (1986), *affirmed and remanded*, 825 F.2d 393 (Fed. Cir. 1987) (explaining that a claim made under a similar "bad men" treaty "is more in the nature of a claim based on contract rather than tort principles"). The *Urie* Court, interpreting that statute and applying it to the nature of the cognizable injury there, found that "injury" resulting from earlier exposure to silica dust was inherently unknowable, finding that the claim had not accrued until 1940, the date when plaintiff became too ill to work and subsequently received the doctor's diagnosis, rather than on the unknowable date on which he first contracted silicosis but did not know it.

But even if the *Urie* Court's accrual analysis under FELA were applicable to this Court's accrual analysis under the Tucker Act, plaintiffs could not establish delayed accrual. The Supreme Court concluded the date of Urie's "injury" was unknowable and the date of the specific "contact" that caused the injury was unknowable. *See Urie*, 337 U.S. at 170 ("The record before us is clear that Urie became too ill to work in May of 1940 and that diagnosis of his condition was accomplished in the following weeks. There is no suggestion that Urie should have known he had silicosis at any earlier date."). As the Court explained, there was no single injurious act that could be defined as the act that caused the "injury" the statute required:

> "It follows that no specific date of contact with the substance can be charged with being the date of injury, inasmuch as the injurious consequences of the exposure are the product of a period of time rather than a point of time; consequently the afflicted employee can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves." The quoted language, used in a state workmen's compensation case, seems to us applicable in every relevant particular to the construction of the federal statute of limitations with which we are here concerned.

Id. (quoting *Associated Indemnity Corp. v. Indus. Accident Comm'n*, 124 Cal. App. 378, 381, 12 P.2d 1075, 1076 (Cal. App. 1932)).

By contrast, the latest "bad men" act or acts of which plaintiffs complain occurred at the instant Dr. Weber committed the crimes alleged in the complaint, acts plaintiffs do not deny knowing occurred. Indeed, that specific knowledge is presumably the basis for their complaint now—not a later-provided medical opinion. Dr. Weber's alleged criminal wrongs were completed at the time of the alleged abuse, regardless of any additional downstream consequences (emotional or psychological) plaintiffs may have endured. *See, e.g.*, 18 U.S.C. §§ 2241(c), 2246(2) (aggravated sexual abuse); 18 U.S.C. §§ 2243(a), 2246(2) (sexual abuse of a minor); *see* Black's Law Dictionary (11th ed. 2019) (defining "injury" as "[t]he violation of another's legal right, for which the law provides a remedy").

Applying the statute of limitations in this straightforward way does not render the "bad men" provision a "delusive remedy," a factor cited in *Urie*, because plaintiffs know the date of their cognizable claim. *See Urie*, 337 U.S. at 169 ("If Urie were held barred from prosecuting this action because he must be said, as a matter of law, to have contracted silicosis prior to November 25, 1938, it would be clear that the federal legislation afforded Urie only a delusive remedy. It would mean that at some past moment in time, unknown and inherently unknowable even in retrospect, Urie was charged with knowledge of the slow and tragic disintegration of his lungs . . . .").

For the reasons stated above and in our motion, the accrual suspension rule does not apply to plaintiffs' treaty claims based on alleged crimes committed by Dr. Weber against plaintiffs, and the Court should dismiss plaintiffs' complaint for lack of jurisdiction.

C. Any Failure To Exhaust Administrative Remedies Would Not Save The Complaint From Dismissal

For completeness, we note that plaintiffs' failure to timely file could be excused only were they to establish that their claims are subject to mandatory administrative remedies, and that they have failed to exhaust those remedies, thereby postponing the accrual of their claims. Plaintiffs, however, do not contend as much and this Court, having examined the question in similar situations, has concluded otherwise. Moreover, if plaintiffs failed to exhaust a mandatory remedy, the Court still would have to dismiss the complaint.

"As a general matter, if a dispute is subject to mandatory administrative proceedings, the plaintiff's claim does not accrue until the conclusion of those proceedings." *Martinez*, 333 F.3d at 1304 (citations omitted). The treaty at issue, the Ft. Laramie Treaty, contains an administrative claims procedure, requiring "'proof' of a claim being 'made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City.'"[3] *Kenyon v. United States*, 683 F. App'x 945, 949 (Fed. Cir. 2017) (per curiam) (footnote omitted) (quoting Ft. Laramie Treaty, Art. I ("upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City")) (expressly declining to reach issue of whether a claim[4]

[3] The duties and authorities formerly vested in the Commissioner of Indian Affairs were transferred to the Department of the Interior's Assistant Secretary for Indian Affairs in 1977. *See* Secretarial Order 3010, 42 Fed. Reg. 53,682 (Oct. 3, 1977).

[4] *Cf. Tsosie v. United* States, 11 Cl. Ct. 62, 75 (1986), *affirmed and remanded*, 825 F.2d 393 (Fed. Cir. 1987) (interpreting a different treaty with the Navajos containing a requirement that Interior "pass[] on" claims, and noting that "*Begay I*, *supra*, in particular, discussed at length the fact that there must first be an administrative decision by the Department of the Interior,

requirement was jurisdictional, but affirming dismissal when the Federal inmate had not filed a claim with the Department of the Interior as required by the treaty); *accord Flying Horse v. United States*, 696 F. App'x 495, 496 (Fed. Cir. 2017) (per curiam) (noting that the court "has found similar 'Bad Men' provisions in other Indian treaties to include at least a minimal exhaustion requirement," *i.e.*, submission of a claim) (citing *Jones*, 846 F.3d at 1348 (Treaty of 1868 with the Utes)).

Here, plaintiffs allege they all submitted claims to the Department of the Interior (Interior). *See* Compl. ¶ 35. To date, we have determined that two of the plaintiffs, Gayton and Martin, have submitted such claims.[5] We also have learned that, by letter dated March 31, 2020 (attached), Interior forwarded those claims to the Department of Health and Human Services (HHS), apparently considering them to present claims under the Federal Tort Claims Act. As a consequence, none of the five plaintiffs has received a merits decision in this case from Interior; but, taking their pleadings as true, it would appear that all five have submitted claims to the Department of the Interior.

As for whether more than submission of a claim is required, the one Court of Federal Claims decision to directly address this issue in the context of the Ft. Laramie Treaty held that the treaty does not require that claimants obtain a decision from Interior before filing suit. *See Elk v. United States*, 70 Fed. Cl. 405, 407 (2006) (citing *Begay v. United States*, 219 Ct. Cl. 599, 602 n.4 (1979)) (pointing to the fact that, whereas other treaties provided that damages shall not be paid until "thoroughly examined and *passed upon* by the Commissioner of Indian Affairs,"

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pursuant to the treaty, but that there clearly was a right on the part of an Indian claimant to seek judicial review of that administrative decision in the Court of Claims") (citing *Begay v. United States*, 219 Ct. Cl. 599 (1979)).

[5] All five plaintiffs have submitted claims to the Department of Health and Human Services.

the Ft. Laramie Treaty contained no such language) (emphasis added) (citations and internal quotation marks omitted); *see also id.* at 409 n.4 ("Adopting defendant's argument here could expose future claimants to being whipsawed—if they do not await a decision from Interior, they could be accused of failing to exhaust administrative remedies; yet, if they await such a decision and more than six years pass from the time of the alleged offense, defendant could invoke the statute of limitations of 28 U.S.C. § 2501."); *cf. Jones v. United States*, 122 Fed. Cl. 490, 514-15 (2015), *vacated and remanded on other grounds*, 846 F.3d 1343 (2017) (interpreting Treaty of 1868 with the Utes and relying on reasoning of *Elk*).

Alternatively, if the dispute is subject to mandatory administrative proceedings, then the case still should be dismissed because Interior has not acted on their treaty claims and, thus, plaintiffs have failed to exhaust administrative remedies. *See Martinez*, 333 F.3d at 1304 (citations omitted).

In sum, regardless of whether this dispute is subject to mandatory administrative proceedings, plaintiffs' allegations of administrative exhaustion in their complaint do not save the complaint from dismissal for lack of jurisdiction.

II. Plaintiffs' Contention About "Unknown Agents And Employees" Is Inapposite

Plaintiffs also contend that "unknown agents and employees of the Indian Health Services discovered that Dr. Weber was a pedophile prior to his 1995 transfer to Pine Ridge and continued to receive such knowledge." Pls. Opp'n 29; *see* Compl. ¶ 25 (alleging "institutional knowledge" about Dr. Weber). Plaintiffs suggest that they were unable to discover the acts of the unknown agents and employees of the Indian Health Services because (1) they were actively concealed and (2) the information was exclusively in the possession of defendant. Pls. Opp'n 29. Plaintiffs raise this contention about the knowledge of "unknown agents and employees" for two

potential reasons: to address plaintiffs' knowledge about Dr. Weber's alleged abuse, and to establish a separate breach of the "bad men" clause based on the knowledge of "unknown agents and employees." We discuss each separately below.

A. The Alleged Knowledge Of Others Does Not Suspend Accrual

Any suggestion that the alleged knowledge of others about Dr. Weber's alleged crimes against plaintiffs or others suspends accrual of plaintiffs' claims concerning those acts fails for two reasons. First, plaintiffs bear the burden of demonstrating that their claim is timely from the outset, not only upon challenge; yet the allegations about the knowledge of others is not sufficiently alleged in the complaint. Second, the alleged knowledge of others about Dr. Weber's alleged crimes against plaintiffs or others does not make the crimes alleged to have been perpetrated on plaintiffs by Dr. Weber "inherently unknowable," for the reasons we have explained above: their knowledge was direct and not derivative of the knowledge of others. Plaintiffs do not contend otherwise. Thus, the alleged knowledge of others, even if entertained by this Court, fails to provide any basis to excuse the untimely filing of their treaty claims based on alleged abuse by Dr. Weber. *See Ingrum*, 560 F.3d at 1315 (the accrual suspension rule "is strictly and narrowly applied") (internal quotation marks omitted).

In support of their contention about the alleged knowledge of "unknown agents and employees," plaintiffs rely on two cases that do not apply to their circumstance, *Holmes v. United States*, 657 F.3d 1303 (Fed. Cir. 2011), and *L.S.S. Leasing Corporation v. United States*, 695 F.2d 1359 (Fed. Cir. 1982). *See* Pls. Opp'n 33. These two cases, as they may relate to "unknown agents and employees," merely illustrate that a breach claim will not accrue at the time of breach if the breach is inherently unknowable. Here, on the other hand, the breach—the

crimes that Dr. Weber allegedly committed against plaintiffs —was knowable at the time of the breach.

B. Plaintiffs Have Not Pled a Cognizable Claim Based On The Knowledge Of Others

Plaintiffs' complaint does not plead a "bad men" claim based on the knowledge of others. *See* Compl. ¶¶ 33, 34 (only alleging "bad men" claim based on Dr. Weber's alleged abuse of plaintiffs). Plaintiffs nevertheless assert otherwise, contending that "[a]ll agents and employees of the United States that had criminal reporting duties and discovered that Weber was a perpetrator prior to the abuse of Plaintiffs caused a 'wrong upon the person of an Indian' under the treaty and are, therefore, bad men." Pls. Opp'n 29 (citing 18 U.S.C. §§ 4, 242, 2258 and 42 U.S.C. § 13031). Plaintiffs continue that "[a]ll agents and employees of the United States that discovered criminal activity and covered it up caused a 'wrong upon the person of an Indian' under the treaty and are, therefore, bad men." *Id.* at 30 (citing 18 U.S.C. §§ 2, 3, 1152, and S.D.C.L. §§ 22-3-3, 22-3-5, 22-22-46, 22-22-24.3). But this argument is inapposite for two reasons: (1) the complaint does not properly allege the "bad men" acts of others; and (2) even if it had, plaintiffs' allegations in the complaint do not demonstrate a cognizable "bad men" claim under the treaty.

Although plaintiffs suggest that their complaint contains a "bad men" claim based on the knowledge of others, the few paragraphs regarding a news report in 2019 in the "Background" section of the complaint that plaintiffs highlight in their opposition, Pls. Opp'n 18 (citing Compl. ¶¶ 25-27), are wholly inadequate to allege such a claim. In essence, plaintiffs suggest that they have stated a claim when they alleged in the background section that "[t]he 2019 news reporting revealed that the Indian Health Service had institutional knowledge of Dr. Weber's sexual abuse of minors in Montana and, despite this, failed to protect Plaintiffs from sexual abuse, assault and

battery and, by so failing, facilitated and, therefore, caused said injuries to Plaintiffs." Compl. ¶ 25. Such an allegation is insufficient to raise a claim within this Court's jurisdiction because it does not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

To the extent plaintiffs seek to enhance their pleadings via their responsive brief with allegations in the brief quoting, among other things, transcripts from a news report and Dr. Weber's criminal trials, they may not. It is "axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss." *Davis v. United States*, 108 Fed. Cl. 331, 337 n.4 (2012) (quoting *Mendez-Cardenas v. United States*, 88 Fed. Cl. 162, 166-67 (2009)) (citations and internal quotation marks omitted). In fact, this Court lacks jurisdiction over claims that a plaintiff attempts to raise in an opposition brief that were not alleged in the complaint. *See, e.g., McGrath v. United States*, 85 Fed. Cl. 769, 772 (2009) ("This court does not possess jurisdiction to hear claims presented for the first time in responsive briefing.") (citations omitted). In short, the complaint is insufficient to place plaintiffs' knowledge-based "bad men" claim before the Court.

Even if the background section of their complaint could be construed as a separate count, such a count would fail to state a claim. *See Ashcroft*, 556 U.S. at 678. "To state a claim for relief under the bad men provision requires the identification of particular 'bad men,' . . . ." *Jones*, 846 F.3d at 1352. The background section of the complaint refers to the Indian Health Service. *See* Compl. ¶ 25. Other than Dr. Weber, plaintiffs failed to identify other "bad men" in their complaint. Claims against organizations or entities are not cognizable. *See Hernandez v. United States*, 93 Fed. Cl. 193, 200 (2010) ("A court, however, is not a specific white man, and

may not qualify as a 'bad man' . . . ."); *Garreaux v. United States*, 77 Fed. Cl. 726, 737 (2007) (rejecting on jurisdictional grounds a claim against a federal agency rather than a "specified white man"); *Banks v. U.S. Marshals Serv.*, No. 15-cv-127, 2016 WL 1394354, at *11 (W.D. Pa. Feb. 16, 2016), *report and recommendation adopted*, 2016 WL 1223345 (W.D. Pa. Mar. 24, 2016) ("[F]ederal agencies cannot be 'bad men' as they are not persons.") (citation omitted).

Further, "[t]o state a claim for relief under the bad men provision requires . . . an allegation that those men committed a wrong within the meaning of the treaty." *Jones*, 846 F.3d at 1352. First, a "wrong" must be one that "could be prosecutable as criminal wrongdoing." *Id.* at 1355. The phrase "any wrong" in the clause is "tied to the concept that the United States would at least have the authority to make an arrest with respect to such wrong." *Id.* That "authority" would, therefore, need to rest in either a federal criminal provision applicable to Indian country under 18 U.S.C. § 1152, or in a state criminal provision made federally punishable through the Assimilative Crimes Act, 18 U.S.C. § 13. *Jones*, 846 F.3d at 1356-57. Such concepts of prosecutability do not apply to the United States per se.

Second, under the Ft. Laramie Treaty's plain language, the "wrong" in question must be one "upon the person or property of the Indian[]." The focus on "person and property" is clear from the treaty language itself. *See Banks v. Guffy*, No. 1:10-cv-2130, 2012 WL 72724, at *6 (M.D. Pa. Jan. 10, 2012) (no viable "bad men" claim for property belonging to someone else). The inquiry focuses upon the individual—rather than the Tribe or some broader sense of societal harm—because the article, like the provision in other similar treaties, "concerns the rights of and obligations to individual Indians . . . ." *Hebah v. United States*, 428 F.2d 1334, 1337 (Ct. Cl. 1970). Plaintiffs do not explain how knowledge about the abuse of others before plaintiffs— or

the purported criminal failure to disclose such knowledge —constitutes a criminal wrong on their "person."

Third, the clause covers only "wrongs" that occurred on the Tribe's reservation or "[w]rongs occurring off-reservation that occur as a direct result of wrongs occurring on-reservation." *Jones*, 846 F.3d at 1361. In the latter instance, the off-reservation "wrong" must have some connection to an on-reservation "wrong." *See id*. Courts have rejected "bad men" cases where the alleged "wrong" occurred wholly outside the lands of the plaintiff's tribe. *See Hernandez v. United States*, 141 Fed. Cl. 454, 462 (2019); *Pablo v. United States*, 98 Fed. Cl. 376, 381-82 (2011); *Herrera v. United States*, 39 Fed. Cl. 419, 420-21 (1997), *aff'd*, 168 F.3d 1319 (Fed. Cir. 1998); *Banks*, 2016 WL 1394354, at *10. Plaintiffs fail to allege how any knowledge-based wrong satisfies the clause in this regard.

In sum, the complaint's short mention of the alleged institutional knowledge that Dr. Weber abused others before plaintiffs does not allege the knowledge-based "bad men" acts to which their brief refers, nor do any such allegations in the complaint sufficiently plead a "bad men" claim. Thus, even if a knowledge-based claim were before the Court, it would fail. For these reasons, plaintiffs' argument about "unknown agents and employees" is inapposite and does not establish the Court's jurisdiction over the complaint.

CONCLUSION

As demonstrated above and in our motion, the Court should dismiss plaintiffs' complaint for lack of jurisdiction.[6]

[6] In the alternative, plaintiffs "request jurisdictional discovery to ascertain the internal knowledge of the Indian Health Services and to establish the active efforts to conceal that knowledge . . . ." Pls. Opp'n 1-2 (citing *Fox Logistics & Constr. Co. v. United States*, 145 Fed. Cl. 236 (2019)). However, as noted above, the issues of alleged Government concealment and

Respectfully submitted,

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Acting Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.
Director

/s/ Steven J. Gillingham
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Assistant Director

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alleged knowledge of others is irrelevant to plaintiffs' claims alleged in the complaint. In sum, plaintiffs have failed to meet their jurisdictional burden and the case should be dismissed. *See Hopi Tribe v. United States*, 113 Fed. Cl. 43, 50 (2013), *aff'd*, 782 F.3d 662 (Fed. Cir. 2015) (failure to satisfy a threshold requirement).

Although plaintiffs' opposition states, "[a]s a further alternative, Plaintiff requests permission to amend their complaint as they will be able to clarify each and every claimed deficiency raised in Defendant's motion as demonstrated herein," plaintiffs have not filed a motion to amend and have not explained how they could cure the deficiencies in their complaint and, accordingly, the passing, undeveloped alternative request should be summarily denied. *See Chapman v. United States*, 130 Fed. Cl. 216, 219 (2017) ("This court has found that granting leave to amend a pleading would be futile if the amended complaint would fail to state a claim upon which relief can be granted, or if the proposed amendment would fail for lack of jurisdiction or is facially meritless and frivolous. A claim that is barred by the statute of limitations would be futile.") (citations and internal quotation marks omitted). Plaintiffs do not, and cannot, allege that the Government concealed the alleged abuse from them and have not shown that the claims based on Dr. Weber's alleged abuse were inherently unknowable.

/s/ Zachary J. Sullivan
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February 3, 2021

Counsel for Defendant

APPENDIX

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Interior's Letter, dated March 31, 2020……...1

United States Department of the Interior

OFFICE OF THE SOLICITOR
Division of General Law, Torts Practice Branch
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Lakewood, CO 80215

Law Offices of Gregory A. Yates
Attn: Michael Shubeck, Esq.
550 North 5th Street, Suite 318
Rapid City, SD 57701

MAR 3 1 2020

RE: Administrative FTCA Claims of Daniel Joseph Martin and Fredrick Louis Gayton,

Dear Mr. Shubeck,

Your letter dated March 6, 2020, regarding this matter has been forwarded to the Office of General Counsel for the Department of Health and Human Services. As stated in our March 4, 2020 letter, the actions alleged by your clients, Daniel Martin and Fredrick Gayton do not fall under the U.S. Department of the Interior.

In accordance with 28 C.F.R. § 14.2(b)(1), claims must be presented to the federal agency whose activities give rise to the claim. Please direct all further communication with the Department of Health and Human Services, Office of General Counsel.

Laura Brown
Deputy Associate Solicitor
Division of General Law

By: Patricia J. Reedy

Patricia J. Reedy
Assistant Solicitor, Division of General Law
Torts Practice Branch

Cc: U.S. Department of Health and Human Services, Office of the General Counsel